contended that the order of the Board was an abuse of its jurisdiction improperly exercised?

Alternative accommodation was mentioned, and the applicant spoke to the respondent of 32 or 45 Birch Road, the latter premises belonging to the applicant's partner. No doubt the stand and goodwill of a goldsmith's business in the main street of Seremban is a great asset. The applicant would have been well advised to have ensured a properly drawn tenancy or lease agreement. The document C.W.1. could be construed in several ways. Mr. Rintoul submitted that a monthly tenancy is apparent, but that is not beyond argument; clearly no legal mind drafted it, and if persons are so unwise as to record their agreements and intentions in such unskilled manner, they must bear the consequences in the way of considerable litigation expenses.

But to return to the motion this Court is unable also for these further grounds to accede to the application.

Before concluding this judgment I wish to mention the very great benefit of having before me in full the addresses of learned Counsel. Their able arguments were recorded in short-hand by my Secretary, Mr. Lee Moh Wah.

The Order is refused, and the motion is dismissed with costs in favour of the respondent.

Application Dismissed.

KUNG SWEE HENG & ANOTHER v. PARITAM KAUR.

[Orig. Civil Juris. (Hill, J.) April 10, 1948]
[Kedah — Civil Suit No. 20 of 1948]

Frustration of Contract — Impossibility of performance — Claim for return of money paid in advance.

This was a claim for the specific performance of an agreement dated the 5th of December 1941 or alternatively the refund of the deposit of $500.00. On the 5th of December 1941 the plaintiffs paid the sum of $500.00 to the defendant as deposit for the purchase of premises at No. 7 Jalan Mahdali and was given a receipt for the money. The war came and the transaction between the parties could not be completed, as the plaintiff was in fear of his life at the hands of the Japanese and as for a considerable period land transfers were prohibited by the Japanese.

Held, (1) that in the circumstances it was impossible for the plaintiffs to perform their part of the contract within a reasonable time and therefore the contract was frustrated; and (2) that, applying the principle laid down in the **Fibrosa Case**, the plaintiffs were entitled to a refund of the deposit of $500.00.

Case referred to:—

(1) *The Fibrosa Case* (1943) A.C. 32.

CIVIL SUIT.

Mrs. B. H. Oon for the Plaintiffs.

R. D. Hume for the Defendant.

Hill, J. : — There is no dispute as to how the transaction between the parties to this case arose. The facts briefly are as follows :—

> Early in December, 1941, the plaintiffs approached Mr. Joo Peng Lim, an Interpreter of this Court, and asked him to ascertain from the defendant, whose husband was a Court Interpreter at Kulim, if she was willing to sell the premises at No. 7 Jalan Mahdali. A reply in the affirmative was given and the defendant fixed the purchase price of $7,800.00 and requested an advance or deposit of $500.00. The plaintiffs accepted this figure and on 5/12/41 handed Mr. Joo Peng Lim the sum of $500.00 and on that day he paid this amount to the defendant and received from her exhibit P-1. Beyond this stage the business between the parties has not progressed.

One of the questions this Court has to decide is whether the Exhibit P-1, which acknowledges the receipt of $500.00, is an agreement and if it is, whether time was the essence of it. This was put forward strongly by Mr. Hume and it seems convenient to consider the point at this stage, though in all the circumstances of this case I doubt if it has any real bearing. P-1 purports to be something more than a mere receipt and by it a date, 21.12.41, is fixed for the payment of the balance of the purchase money. At the time P-1 was written it is not disputed that plaintiffs were willing and able to complete the purchase. The fixing of any date was a matter, it seems clear from Mr. Joo Peng Lim's evidence, of mere convenience to the defendant and her husband the date fixed being one on which they could conveniently travel to Alor Star from Kulim. At the time the purchase price was agreed on and when the plaintiffs parted with the $500.00 deposit, no question of time was stipulated or even raised. The plaintiffs were not signatories to the document P-1 which was written after they had parted with their $500.00 and I am therefore of the opinion that P-1 is not a contract, that it should be regarded as a mere receipt and that time was therefore not of the essence of the contract between the parties.

On 8.12.41 the war came to Alor Star and the male plaintiff, who has stated that he was engaged in anti-Japanese activities, had to flee in fear of his life at the hands of the invaders. Only once during the Japanese occupation did he return to Alor Star, and then secretly. In addition to these "personal" reasons of the male plaintiff, the Japanese authorities for some

considerable period prohibited land transfers and thus the plaintiffs were prevented from completing their part of the transaction within a reasonable time. Their case is that the contract was frustrated and that they are entitled to relief all the more so as by exhibits P-5, P-6 and P-7 the defendant had repudiated the contract.

I must now consider if it was impossible for the plaintiffs to perform their part of the contract within a reasonable time. I do not propose to place a scientifically exact meaning on the word impossibility in applying it in the circumstances of this case. The American Law Institute has defined impossibility as follows :—

> Impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.

This definition has, I believe, been generally accepted by British Courts and is cited by *Webber* in his great book "The Effects of War on Contracts" at page 453. I propose to apply it in this case.

I accept the plaintiffs' evidence in this connection and in the circumstances in which I am satisfied they were placed I am of opinion that it is the only reasonable conclusion to come to that it became impossible for them to perform their part of the contract.

Having come to the above conclusion it seems clear that I must now apply the doctrine of frustration. Further, it is evident that the parties, far from making full provision for the state of affairs which arose, do not appear even to have contemplated the possibility.

Mr. Hume has referred to the "Coronation Seat Cases", but the doctrine of frustration has developed so considerably since those cases that they must be regarded as being out of date. I look to the *Fibrosa* case[1] to find the solution to the present case. That case laid down the principle that if money has been paid in advance under a contract which becomes frustrated, and the payer has received nothing in return, the consideration has totally failed and he is entitled to his money back.

To recapitulate therefore, I find in this case as follows : — (a) that time was not the essence of the contract; (b) that it became impossible for the plaintiffs to perform their part of the contract within a reasonable time; (c) that no provision was agreed on by the parties for the state of affairs which arose; (d) that the contract was therefore frustrated and that the doctrine of frustration should apply and (e) that plaintiffs paid money in advance and received nothing in return.

I am of opinion that the plaintiffs are entitled to their money back and I accordingly enter judgment for them for the amount of $500.00, with costs.

Judgment for Plaintiffs.

PUBLIC PROSECUTOR v. KOK HENG & 2 ORS.

[J.B. — Crim. Case No. 11/48 (Laville, J.) May 5, 1948]

Penal Code Ss. 392, 397 — Armed robbery — Identification by photograph and further inspection — Form of Warrant of Arrest and procedure to be followed.

The three accused were charged with robbery of $20/- from one Lim Geok Long and of being armed while carrying out the robbery. The identification of the prisoners was carried out by photographs while they were in police custody. The accused were formally arrested on warrants on 30th March and 1st April: each warrant was issued on 15th March and according to the evidence of Mohamed Eusoff, on an information of robbery given by him to the Magistrate, but none of these warrants bore on the body of the warrant any indication of the offence with which the man to be arrested was charged.

Held, (a) That while identification by photograph before arrest is acceptable in law, it has always been held that once a man has been arrested the identification should be by personal inspection. If there is identification by photograph, the identification and method by which it is held must be flawless. (b) It is a misuse of legal powers to issue a warrant bearing the charge typed on a piece of paper attached to the warrant where such annexure is not authenticated by the Magistrate issuing the warrant.

CRIMINAL TRIAL.

W. M. McCall for the Public Prosecutor.

Accused in person.

Laville, J. : — Police act on a hearsay report, maker of which is not called.

Sole evidence is identification by Lim Geok Long, and the whole evidence depends on his word alone; no corroboration of his $20; no corroboration as to revolvers or as to hold up.

Identification by photographs: this in certain circumstances may be reliable, but it is, in my opinion, dangerous, if followed by an identification parade in that it must inevitably tend to identification of the photograph rather than the person. In this case, identification of No. 3 accused cannot be accepted.